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DISCUSSION OF RECENT DECISIONS

BANKRUPTCY—ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE—WHETHER HOLDER OF ASSIGNMENT OF OPEN ACCOUNT RECEIVABLE IS ENTITLED TO PREFERENCE OVER OTHER CREDITORS WHEN NO NOTICE OF ASSIGNMENT HAS BEEN GIVEN—The facts in *Corn Exchange National Bank & Trust Company v. Klauder*¹ disclosed that a corporation had become embarrassed for want of working capital. A large group of creditors agreed to subordinate their claims and installed a creditor's committee to supervise the corporate business. That committee induced a bank to advance funds upon assignment of accounts receivable. Involuntary bankruptcy proceedings were instituted shortly thereafter, but when the bank sought to enforce its security under such assignments, the trustee challenged on the ground that the same were invalid since no notice had been given to the debtors whose obligations had been taken as security. It was held therein that such assignments constituted an illegal preference within the meaning of Section 60(a) of the Bankruptcy Act,² and the court

¹ —U. S.—, 63 S. Ct. (adv.) 679, 87 L. Ed. (adv.) 632 (1943), affirming *In re Quaker City Sheet Metal Co.*, 129 F. (2d) 894 (1942). Mr. Justice Roberts dissented. The court noted a conflict between the instant case and *Adams v. City Bank & Trust Co. of Macon, Ga.*, 115 F. (2d) 453, 134 A. L. R. 1215 (1940).

² 11 U. S. C. A. § 96(a).

refused to recognize any exception to the policy outlined in the statute.

The use of open account financing has grown to sizable proportions in recent years, but for obvious reasons the borrower does not wish either his customers or his other creditors to learn of the borrowing arrangement since resort thereto tends to reflect an unsatisfactory financial position. It is, too frequently, the last source of ready funds,³ and experience has shown that, when bankruptcy intervenes, the borrower's most liquid assets have thereby been removed from the reach of general creditors. Such transactions had, however, received sanction under former insolvency laws,⁴ if no actual fraud was involved in the arrangement.⁵ Such factors, then, no doubt motivated Congress to declare that transfers of this sort⁶ would be deemed in violation of the act unless they had become so far perfected that no "bona-fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior" to those of the assignee. If superior rights could be acquired, the purported assignment, regardless when made, was to be treated as being made immediately prior to bankruptcy and, therefore, being deemed as based on an antecedent consideration even though actually given for a present valuable one.

To determine whether an assignment has become "perfected" as against subsequent purchasers and creditors, recourse must be had to local law,⁷ which, in the absence of statute,⁸ generally provides that a subsequent assignee of the same claim gets no rights therein,⁹ even though no notice has been given to the debtor of the former assignment,¹⁰ unless the subsequent assignee has (1) obtained payment of

³ Saulnier and Jacoby, *Accounts Receivable Financing* (National Bureau of Economic Research, 1943), pp. 6, 21 et seq., 61 et seq.

⁴ *Greey v. Dockendorff*, 231 U. S. 513, 34 S. Ct. 166, 58 L. Ed. 339 (1913); *Salem Trust Co. v. Manufacturers' Finance Co.*, 264 U. S. 182, 44 S. Ct. 266, 68 L. Ed. 628, 31 A. L. R. 867 (1924).

⁵ *Benedict v. Ratner*, 268 U. S. 353, 45 S. Ct. 566, 69 L. Ed. 991 (1925).

⁶ Assignments are unquestionably transfers within the meaning of 11 U. S. C. A. § 96(a) by reason of the provisions of 11 U. S. C. A. § 1(25).

⁷ *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

⁸ Statutes exist in some states with reference to the manner of perfecting assignments of accounts receivable. See, for example, Ohio Laws 1941, p. 850, providing for the filing of a general notice of intention to assign; Georgia, Act of Feb. 26, 1943, by notice on assignor's books which shall be good as against all persons "except the debtor"; Pennsylvania, 69 Purdon's Pa. Stat. (Supp.) § 561, enacted subsequent to the transfers involved in the instant case, by notifying the debtor or by marking the assignor's books in the fashion therein indicated.

⁹ *Sutherland v. Reeve*, 151 Ill. 384, 38 N.E. 130 (1894). The court therein said: "There is no place for the doctrine of *bona fide* purchase for value without notice, in the transfer of such a chose in action. Not only does any purchaser of a chose in action of this character take it subject to all equities of the original parties to the chose in action, but a second or subsequent assignee takes it subject to all equities existing between any prior assignor and assignee." — 151 Ill. 384 at 393, 38 N.E. 130 at 133.

¹⁰ Williston, *Contracts* (Rev. Ed.) § 435.

the account,¹¹ (2) secured a judgment in his own name against the debtor,¹² or (3) has been given a new contract by the debtor in the nature of novation.¹³ Even then, in at least one state, the second assignee must turn over the proceeds collected despite the fact that no notification had occurred.¹⁴ In Pennsylvania though, from which area the instant case originated, the subsequent good-faith assignee who merely gives notice to the debtor attains priority over an earlier assignee who has failed to give such notice.¹⁵

Despite such local rules, the court in the instant case, by giving literal application to the language of the statute in question, has held that even though no subsequent assignment exists, and even though no person has "perfected" better rights, still, if some individual might have been able to do so, the otherwise valid and paid for assignment will be regarded as invalid should bankruptcy intervene. For purpose of settlement of claims in bankruptcy, therefore, a new rule has been engrafted on the local law of each state, i. e. notice to the debtor whose account has been assigned is essential to preserve the assignee's rights unless some other method of notice has been, or may be, designated.¹⁶

It is difficult, however, to see what real value is involved in giving notice to the debtor of the assignment of an account receivable. Though the facts are thereby made known to the three most interested parties, to-wit: assignor, assignee, and debtor, it is not likely that the other creditors of the assignor whose interests are also vitally concerned will be in any way advised thereof,¹⁷ so that they will be any the better protected thereby. If notice to them is the end to be desired, it would seem that recording legislation of some kind would be necessary,¹⁸ and, if enacted, it should give particular attention to the time for the recording of any such assignment.

In that regard, it should be noted that trust receipts, at least where

¹¹ *Bridge v. Wheeler*, 152 Mass. 343, 25 N.E. 612 (1890).

¹² *Judson v. Corcoran*, 17 How. (U.S.) 612, 15 L. Ed. 231 (1855).

¹³ *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30 at 80 (1865); *Strange v. H. & T. C. R. R. Co.*, 53 Tex. 162 (1880).

¹⁴ *State Factors Corp. v. Sales Factors Corp.*, 257 App. Div. 101, 12 N. Y. S. (2d) 12 (1939); *Superior Brassiere Co. v. Zimetbaum*, 214 App. Div. 525, 212 N. Y. S. 473 (1925).

¹⁵ *Phillips's Estate*, 205 Pa. 515, 55 A. 216, 66 L. R. A. 760 (1903).

¹⁶ See Hanna, "The Extension of Public Recordation," 31 Col. L. Rev. 617 (1931), for a commentary on the value of other methods of notice.

¹⁷ The court in the instant case recognized the fact by saying: "It is true that notice to the debtors sufficient to satisfy the requirements of applicable state law might never have been communicated to the creditors. . . . But the fact that the remedy may fall short in these respects does not justify denying it all effect." See —U. S.—at—, 63 S. Ct. 679 at 683, 87 L. Ed. (adv.) 632 at 636.

¹⁸ The Ohio statute, Ohio Laws 1941, p. 850, is the only one of this nature at present. It reads in part: "Any person . . . to whom an account receivable . . . may be assigned . . . shall, prior or contemporaneously therewith to any such assignment, file with the county recorder of the county wherein the person

the Uniform Trust Receipts Act is in operation, are regarded as valid against creditors without any public recording for a period of thirty days,¹⁹ so that presumably, if bankruptcy intervenes within such period, the holder's rights would not be affected so long as recording did come within the allotted period. But it would seem, from the decision in the instant case, that if not filed within the thirty-day period, the benefit of the trust receipt might well be lost should bankruptcy follow.²⁰ In much the same way chattel mortgages²¹ and real estate mortgages and transfers²² may be laid open to attack as secret preferences if the literal reading given the statute in the instant case is applied to them.

Persons engaged in lending funds on the security of accounts receivable, especially those who have dealt therein on a non-notification basis, will need to give particular heed to the decision in the instant case, as it is likely to result in an overthrow of long-recognized methods of doing business.

M. L. GOODMAN

CORPORATIONS—CORPORATE POWERS AND LIABILITIES—EFFECT OF PUBLIC LIABILITY INSURANCE ON LIABILITY OF CHARITABLE CORPORATION FOR THE NEGLIGENCE OF ITS AGENTS—In *Myers v. Young Men's Christian Association of Quincy*¹ it appeared that the plaintiff had purchased tickets to witness a soft ball game conducted in a park operated by defendant and had been injured when a tier of bleacher seats on which he was sitting collapsed. He filed a suit as for negligent injury, his complaint consisting of two counts. The first was an ordinary count by an invitee and upon trial thereon, over defendant's answer that it was a charitable corporation incorporated not for profit, plaintiff obtained a verdict and judgment. The second count alleged that the defendant carried public liability insurance to protect it from any loss which might arise through the negli-

to whom such account is owing resides . . . an affidavit setting forth the name and address of the transferee and of the transferor . . . and stating that the transferor has arranged to assign to the transferee an account or accounts, which account or accounts need not be described . . . in any manner. Such affidavit . . . shall be filed and indexed in the same manner as chattel mortgages. . . . The deposit . . . for filing of such an affidavit shall constitute notice to all persons except the obligors that the transferor intends to assign one or more of his accounts . . . until such affidavit shall have expired or been cancelled. . . ."

¹⁹ Ill. Rev. Stat. 1941, Ch. 121½, § 172.

²⁰ The Uniform Trust Receipts Act affords no protection to the holder in the event the goods are purchased by a good-faith buyer for value in the ordinary course of business: Ill. Rev. Stat. 1941, Ch. 121½, § 174(2)(a)(I). Since such a person could "perfect" rights, even if the holder did file as required by law, serious doubt is cast on the validity of any trust receipt in the event of bankruptcy of the person entrusted.

²¹ Ill. Rev. Stat. 1941, Ch. 95, § 4.

²² Ill. Rev. Stat. 1941, Ch. 30, § 29.

¹ 316 Ill. App. 177, 44 N.E. (2d) 755 (1942).

gence of its agents. This count was, on defendant's motion, stricken from the complaint. On defendant's appeal from the judgment on the first count, plaintiff assigned cross-error in the ruling striking the second count. Held: judgment for plaintiff reversed, and ruling on the second count affirmed as the allegation of insurance was improper since it tended to prejudice the rights of the defendant who could not, under Illinois law, otherwise be held liable for negligence.

— The case, insofar as it involves the effect of insurance indemnifying a charitable institution against judgments in actions against it for the negligence of its agents, is one of first impression in the courts of Illinois. The statement of the court in the instant case that a contrary doctrine has not been adopted by courts of review in Illinois is correct only in the sense that the question has never, heretofore, been presented to such courts. It is true that a charitable institution in Illinois is not, generally speaking, liable for the negligence of its agents since the Illinois courts hold that the funds of such institutions are held in trust for charitable purposes and cannot be diverted to other uses.² The fact that a fee is paid to the charitable institution by the person injured is regarded as being immaterial.³

Other states have adopted a similar rule, but have often given other reasons than the "trust fund" theory for their actions. Thus it has been said to be based on public policy;⁴ on the theory that the charity is performing a public function;⁵ on the theory that the doctrine of respondeat superior is inapplicable to charitable institutions;⁶ or, in the case of beneficiaries of the charity, on the theory of an implied waiver.⁷

But the rule of non-liability of charitable institutions for the torts of their agents is by no means universally adopted by the courts of the United States, and it has been said that the "trust fund" theory has been abandoned in England.⁸ One court in the United States treats charitable institutions in the same manner as private corporations for

² *Parks v. Northwestern University*, 218 Ill. 381, 75 N.E. 991, 2 L. R. A. (N.S.) 556, 4 Ann. Cas. 103 (1905).

³ *Hogan v. Chicago Lying-In Hospital & Dispensary*, 335 Ill. 42, 166 N.E. 461 (1929); *Maretick v. South Chicago Community Hospital*, 297 Ill. App. 488, 17 N.E. (2d) 1012 (1938).

⁴ *Jensen v. Maine Eye & Ear Infirmary*, 107 Me. 408, 78 A. 898, 33 L. R. A. (N.S.) 141 (1910).

⁵ *Morrison v. Henke*, 165 Wis. 166, 160 N.W. 173 (1916). But see vigorous dissent in *Bachman v. Young Women's Christian Ass'n*, 179 Wis. 178, 191 N.W. 751, 30 A. L. R. 448 (1922), and *University of Louisville v. Hammock*, 127 Ky. 564, 106 S.W. 219, 14 L. R. A. (N.S.) 784, 128 Am. St. Rep. 355 (1907).

⁶ *Hearns v. Waterbury Hospital*, 66 Conn. 98, 33 A. 595, 31 L. R. A. 224 (1895).

⁷ *Powers v. Massachusetts Homeopathic Hospital*, 109 F. 294, 65 L. R. A. 372 (1901).

⁸ *Lavere v. Smith's Falls Public Hospital*, 35 Ont. 98, 9 B. R. C. 13, 26 Dom. L. R. 346 (1915).

profit, at least so far as tort liability is concerned.⁹ In other states, as, for example, Tennessee, which would ordinarily apply the "trust fund" theory, charitable institutions have been held liable at the instance of non-beneficiaries of the charity.¹⁰ It has also been held that charitable institutions are liable for the negligent selection of their agents,¹¹ or are liable on other assorted theories.¹²

Two recent cases have held, contrary to the holding in the instant Illinois case, that where insurance against loss protects the trust funds of the charity, the "trust fund" theory does not operate to immunize it,¹³ and it is worthy of note that this view has been followed by two nisi prius courts in Illinois.¹⁴ It is also a matter of common knowledge that the Catholic Bishop of Chicago stipulates that insurance companies, when defending local Catholic charities, shall not plead the "trust fund" theory as a defense.¹⁵

There is some ground for the belief that immunity from liability for negligence may yet be denied to insured charities in Illinois, for the Illinois courts have rendered some decisions apparently inconsistent with the strict application of the "trust fund" theory. It has been practically eliminated as a defense for public charitable institutions;¹⁶ a default judgment against a charity on a complaint based on negligence has been upheld;¹⁷ a judgment based on the theory of an implied con-

⁹ *Geiger v. Simpson Methodist-Episcopal Church*, 174 Minn. 389, 219 N.W. 463, 62 A. L. R. 716 (1928).

¹⁰ *Love v. Nashville Agricultural and Normal Institute*, 146 Tenn. 550, 243 S.W. 304 (1922); *Hall-Moody Institute v. Copass*, 108 Tenn. 582, 69 S.W. 327 (1902); *Henry W. Putnam Memorial Hospital v. Allen*, 34 F. (2d) 927 (1929); *Bruce v. Central Methodist Episcopal Church*, 147 Mich. 230, 110 N.W. 951, 10 L. R. A. (N.S.) 74 (1907); *Gallon v. House of Good Shepherd*, 158 Mich. 361, 122 N.W. 631, 24 L. R. A. (N.S.) 286, 133 Am. St. Rep. 387 (1909); *Marble v. Nicholas Senn Hospital Ass'n of Omaha*, 102 Neb. 343, 167 N.W. 208 (1918); *Hospital of St. Vincent of Paul v. Thompson*, 116 Va. 101, 81 S.E. 13, 51 L. R. A. (N.S.) 1025 (1914); and *Gilbert v. The Corporation of Trinity House*, L. R. 17 Q. B. Div. 795 (1886).

¹¹ *Taylor v. Flower Deaconess Home and Hospital*, 104 Ohio St. 61, 135 N.E. 287, 23 A. L. R. 900 (1922); *Roberts v. Ohio Valley General Hospital*, 98 W. Va. 476, 127 S.E. 318, 42 A. L. R. 968 (1925).

¹² For exhaustive annotations of various theories of liability or non-liability, see: 149 L. R. A. 572; 23 A. L. R. 923; 30 A. L. R. 455; 33 A. L. R. 1369; 42 A. L. R. 971; 62 A. L. R. 724; 86 A. L. R. 491; 109 A. L. R. 1199; and 133 A. L. R. 821.

¹³ *O'Connor v. Boulder Colorado Sanatorium Ass'n*, 105 Colo. 259, 96 P. (2d) 835 (1939); *Vanderbilt University v. Henderson*, 23 Tenn. App. 135, 127 S.W. (2d) 284 (1938).

¹⁴ *Weil Cartage Company v. Sisters of Holy Family of Nazareth*, 38-C-3374, Circuit Court of Cook County, Illinois, noted in 20 Chi. Bar Record 141; *Shaleen v. The Newberry Library*, 39-S-11479, Superior Court of Cook County, Illinois, noted in 21 CHICAGO-KENT LAW REVIEW 8, note 45.

¹⁵ See, for example, *Kos v. Catholic Bishop of Chicago*, 317 Ill. App. 248, 45 N.E. (2d) 1006 (1942).

¹⁶ *Johnston v. City of Chicago*, 258 Ill. 494, 101 N.E. 960 (1913).

¹⁷ *Marabia v. Thompson Hospital*, 309 Ill. 147, 140 N.E. 836 (1923).

tract has been affirmed;¹⁸ and a proceeding under the Dram Shop Act has been sustained.¹⁹

The argument advanced to support the decisions of courts holding charitable institutions liable in cases where insurance is known to exist is based on the familiar rule of law that when the reason for a rule ceases to exist the rule itself is outmoded. Since the trust funds of the charity are in no danger when adequate insurance exists, there is no longer any reason for the need of immunity, hence the rule itself should fall. It is felt that the court in the instant case did not give adequate consideration to this phase of the problem. The argument that it is improper to inform the jury that the defendant is insured begs the question. Such a rule would not be involved if the allegation of the existence of insurance be a proper one, as it frequently is, for example, in suits on insurance policies. Furthermore, the issue would not be raised for the consideration of the jury unless the fact of insurance was denied by the charitable institution. If raised, the presence of such insurance would have to be proven by such evidence as would be sufficient to take the case to the jury, or the defendant would be entitled to a directed verdict on that issue. If the fact of insurance were not controverted by answer, the issue would never be brought to the attention of the jury as the complaint, in Illinois, does not go to the jury room.

It is believed that a statute requiring compulsory insurance of charitable institutions and eliminating the defense of immunity would satisfactorily solve all problems. Pending the enactment of such a statute, the action of charitable institutions in voluntarily procuring insurance, thereby apparently recognizing some obligation to persons injured by the negligence of their agents, should not be nullified by the courts through the device of permitting insurance companies to assert defences, in suits based on such negligence, which were not designed for their benefit.

DAVID F. MATCHETT, JR.

CORPORATIONS—CORPORATE POWERS AND LIABILITIES—WHETHER OR NOT CHANGE OF REGISTERED OFFICE OF CORPORATION IS EFFECTIVE AS TO THIRD PERSONS BEFORE CERTIFICATE THEREOF HAS BEEN FILED WITH SECRETARY OF STATE AND ALSO RECORDED—In the recent bankruptcy proceeding entitled *In re National Mills, Inc.*,¹ the holder of a corporate chattel mortgage sought to impress a lien on the proceeds of property sold by the trustee. The latter contested the allowance of such lien on the ground that the chattel mortgage was invalid because of improper recordation. In support thereof, it was shown that the mortgage was executed at Quincy and duly

¹⁸ *Armstrong v. Wesley Hospital*, 170 Ill. App. 81 (1912). See also *Mater v. Silver Cross Hospital*, 285 Ill. App. 437, 2 N.E. (2d) 138 (1936).

¹⁹ *Klopp v. Benevolent Protective Order of Elks*, 309 Ill. App. 145, 33 N.E. (2d) 161 (1941).

¹ Sub. nom. *VanAusdall v. McCanon*, 133 F. (2d) 604 (1943).

recorded in Adams County, but that prior thereto the corporation had executed, and filed with the Secretary of State, a certificate of change of registered office. Though filed with such official, the duplicate original thereof was not recorded in either Cook County, to which the registered office was being transferred, or in Adams County, in which the corporation had been originally organized until some time after the chattel mortgage had been placed on record.² On these facts, the District Court had deemed the chattel mortgage invalid and denied the asserted lien. On appeal by claimant, it was held that the judgment should be reversed and claimant's lien should be granted.

To determine the validity of an Illinois chattel mortgage under these circumstances it is necessary to resort not only to the Illinois statute relating to chattel mortgages³ but also to interpret certain sections of the Illinois Business Corporation Act.⁴ The fundamental question, however, involves the issue as to just when a corporation accomplishes a change of residence from one county to another, not only as to the state of incorporation but also as to third persons who may have occasion to deal with it. In deciding that such change is not accomplished until notoriety is given to that fact by both filing with the Secretary of State and also by recording in the appropriate counties, the instant case becomes clearly one of first impression in Illinois.

The question would seem to have been answered differently by the express language of Section 12 of the Business Corporation Act which concludes: "The change of address of the registered office . . . shall become effective upon the filing of such statement by the Secretary of State."⁵ The court, however, came to an adverse conclusion on the ground that the "effectiveness" of the change accomplished in that fashion was to be confined to an alteration in the relationship existing

² The facts disclose that the corporation executed the certificate of change of registered office on February 21; that the same was stamped filed by the Secretary of State on February 28; that the chattel mortgage was executed on March 10 and recorded the next day; but the recording of the change of registered address was not accomplished until March 21 in Cook County, and March 24 in Adams County. By Ill. Rev. Stat. 1941, Ch. 32, § 157.144, the recording should have occurred within fifteen days after mailing by the Secretary of State. Such fifteen-day period had not expired in the instant case when the chattel mortgage was recorded.

³ Ill. Rev. Stat. 1941, Ch. 95, § 4, requires that, for validity against creditors, the chattel mortgage must be recorded with the recorder of the county "in which the mortgagor shall reside at the time when the instrument is executed and recorded." A subsequent removal to another county does not affect the lien thus acquired: *Haugens v. Holmes*, 314 Ill. App. 168, 41 N.E. (2d) 109 (1942).

⁴ Ill. Rev. Stat. 1941, Ch. 32 § 157.2(n) which defines the registered office of the corporation; § 157.11 which requires the corporation to maintain a registered office and a registered agent; and § 157.12 which describes the method of changing the registered office and registered agent.

⁵ Ill. Rev. Stat. 1941, Ch. 32, § 157.12. Similar language in Cahill's Ill. Rev. Stat. 1929, Ch. 32, §§ 63 and 131, was held not to bind a third person until notice was given by recording in *Re Greer College and Airways*, 53 F. (2d) 585 (1931).

between the state and the corporation. Only by public recording, the court felt, could notice be given to third persons so as to affect their rights since the latter might have difficulty learning of the facts otherwise. In this regard it is noteworthy that, scattered through the provisions of the Business Corporation Act, appears similar language requiring that, subsequent to filing with the Secretary of State, the duplicate original of the document in question shall be recorded in the appropriate county.⁶ From the frequency thereof, the court deemed the legislative purpose to be clearly designed to provide notoriety for any such action taken.⁷ By reason of the constant use of the word "shall" in such provisions, it also regarded the requirement of recording as being mandatory. Inasmuch as the principal place of business or residence of an Illinois corporation is that designated in the articles of incorporation until a change of residence is made according to law,⁸ it must be understood hereafter, if the decision in the instant case stands, that a complete change thereof has not occurred merely by filing a certificate of such fact with the Secretary of State.

It should be remembered, however, that under earlier statutes, *de jure* corporate existence did not begin in Illinois until a copy of the articles of incorporation had been duly recorded in the appropriate county.⁹ Under the law as then constituted, failure to record might be the basis for proceedings in the nature of quo warranto to terminate corporate existence,¹⁰ and might result in leaving the shareholders personally liable unless *de facto* existence could be relied on as a defense.¹¹ The framers of the present act doubtless had these things in mind when they provided that filing by the Secretary of State should make the articles of incorporation, or any amendment thereto, effective immediately.¹² Recording was still to be required, and oversight in failing to record was to be penalized, but not nearly so severely as heretofore. In lieu of former penalties, a provision was inserted in the present act fixing a criminal penalty on the corporation.¹³ No remedy in favor of third persons dealing with the defaulting corporation could be predicated

⁶ See, for example, Ill. Rev. Stat. 1941, Ch. 32, §§ 157.15, 157.48, 157.56, 157.58, 157.58a, 157.59, 157.68, 157.77, and 157.79c. The duty to record under §§ 157.74 and 157.81 is on the Secretary of State, while under § 157.92 it is on the clerk of the court having jurisdiction of the dissolution proceedings.

⁷ The court, in this respect, relied on *People ex rel. Tilton v. Mackey*, 255 Ill. 144, 99 N.E. 370 (1912).

⁸ *Fairbanks Steam Shovel Co. v. Wills*, 240 U. S. 642, 36 S. Ct. 466, 60 L. Ed. 841 (1916), affirming 212 F. 688 (1914).

⁹ *Hurd Ill. Rev. Stat. 1889*, Ch. 32, § 4.

¹⁰ *People ex rel. Tilton v. Mackey*, 255 Ill. 144, 99 N.E. 370 (1912).

¹¹ *Gade v. Forest Glen Brick & Tile Co.*, 165 Ill. 367, 46 N.E. 286 (1897).

¹² See *Illinois Business Corporation Act Annotated* (Foundation Press, Chicago, 1934), 201. In much the same way, merger or consolidation are accomplished instantly upon the issuance of the certificate relating thereto by the Secretary of State, according to Ill. Rev. Stat. 1941, Ch. 32, § 157.67, even though recording thereof is required by § 157.68.

¹³ Ill. Rev. Stat. 1941, Ch. 32, § 157.100.

thereon, however, for provisions of this nature are designed solely for the benefit of the state and will be strictly construed.¹⁴ If the decision in the instant case is to become the basis for a series of decisions leading to a return of the former views regarding the effect of failure to record, it might well be deplored, for it might result in substituting a series of possibly conflicting rules for the one uniform rule intended by the framers of the present statute.

D. C. CAMPBELL

COURTS—JURISDICTION AND POWERS OF FEDERAL COURTS—WHETHER INTERFERENCE WITH INTERSTATE COMMERCE IS GROUND FOR EXERCISE OF JURISDICTION BY FEDERAL DISTRICT COURT IN A LABOR DISPUTE BETWEEN CITIZENS OF THE SAME STATE—In the recent case of *Toledo, Peoria & Western Railroad v. Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27*,¹ the defendant union had been chosen by the employees of the plaintiff to represent them under the provisions of the Railway Labor Act.² As such duly chosen representative, it opened negotiations with the plaintiff concerning working conditions. An agreement could not be reached, and acts of violence followed. The violence and interference complained of grew out of the failure of the parties to reach a satisfactory agreement through negotiation or mediation. The plaintiff refused to submit to arbitration, although the defendants offered to arbitrate and provisions exist in the statute for voluntary arbitration.³ The plaintiff thereupon sought and secured an injunction in the district court restraining the defendants from such acts and from interfering with plaintiff's property. On appeal therefrom, the defendants contended that the district court did not have jurisdiction, but such injunction was upheld by the United States Circuit Court of Appeals, Seventh Circuit.

The jurisdiction of the Federal district courts is limited to those matters conferred by the Constitution and the laws of the United States.⁴ In support of its contention that jurisdiction existed, the plaintiff contended that the suit was one within the provisions of the statute conferring jurisdiction upon the district courts in all civil suits where the matter in controversy exceeds \$3000, and was also one which arose under the laws of the United States.⁵ In order to come within this classification, the plaintiff relied upon Federal laws regulating com-

¹⁴ *Chicago R. I. & P. R. Co. v. People*, 217 Ill. 164, 75 N.E. 368 (1905).

¹ 132 F. (2d) 265 (1943). Minton, J., dissented.

² 45 U. S. C. A. §§ 151-63.

³ 45 U. S. C. A. §§ 157 et seq., provide for the selection of arbitrators, the method of procedure and for the finality of the decision of the selected arbitrators. Once the parties have submitted to arbitration, the consent of both is necessary to discontinue the proceedings. The award of the arbitrators is enforceable in court. The only grounds for invalidating any award are fraud on the part of the members, non-conformity with the agreement to arbitrate, and non-conformity with the substantive provisions of the act.

⁴ *City of Indianapolis v. Chase Nat. Bank*, 314 U. S. 63, 62 S. Ct. 15, 86 L. Ed. 47 (1941); *Metropolitan Life Ins. Co. v. United States*, 107 F. (2d) 311 (1939), cert. den. 310 U. S. 630, 60 S. Ct. 978, 84 L. Ed. 1400 (1940).

⁵ 28 U. S. C. A. § 41(1).

merce and also upon that provision of the Judicial Code which states that the district court shall have jurisdiction of "all suits and proceedings arising under any law regulating commerce."⁶ The cases cited by plaintiff, or which bear upon the point, all seem to agree that before a case is one arising under the laws of the United States the action must really and substantially involve a controversy respecting the construction and effect of the legislation, upon the determination of which controversy the result depends. The cause of action must be shown to bear some reasonable relation to the regulatory provisions relied upon before jurisdiction exists.⁷

As an argument for the existence of jurisdiction, the plaintiff set up the fact that it is an interstate carrier, and was subject to the provisions of the federal statutes passed to regulate its conduct. The decisions have repeatedly stated that the mere fact that interstate business is involved does not of itself confer jurisdiction upon the federal courts.⁸ Seemingly, the plaintiff sought to invoke the power of the federal court to protect its property solely on the ground that the property was being used in interstate commerce. If the interference complained of had been a trespass in an isolated instance by a stranger, instead of one arising from a labor dispute, the plaintiff could not attempt to invoke federal jurisdiction under the act to regulate commerce.⁹ It does not logically follow that concerted action of the same character by a group removes the jurisdictional objection to the maintenance of the action.

The proper test for determining jurisdiction is set forth in

⁶ 28 U. S. C. A. § 41(8).

⁷ *Phillips v. U. S.*, 312 U. S. 246, 61 S. Ct. 480, 85 L. Ed. 800 (1941); *Gully v. First National Bank*, 299 U. S. 109, 57 S. Ct. 96, 81 L. Ed. 70 (1936); *Puerto Rico v. Russell & Co.*, 288 U. S. 476, 53 S. Ct. 447, 77 L. Ed. 903 (1933); *Niles-Bement-Pond Co. v. Iron Moulders Union*, 254 U. S. 77, 41 S. Ct. 39, 65 L. Ed. 145 (1920); *Shulthis v. McDougal*, 225 U. S. 561, 32 S. Ct. 704, 56 L. Ed. 1205 (1912); *Defiance Water Co. v. Defiance*, 191 U. S. 184, 24 S. Ct. 63, 48 L. Ed. 140 (1903); *Shoshone Mining Co. v. Rutter*, 177 U. S. 505, 20 S. Ct. 726, 44 L. Ed. 864 (1900); *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571, 20 S. Ct. 222, 44 L. Ed. 276 (1900); *Gold Washing and Water Co. v. Keyes*, 96 U. S. 199, 24 L. Ed. 656 (1878); *Cohens v. Virginia*, 19 U. S. 264, 5 L. Ed. 257 (1821); *McGoon v. Northern Pacific Ry. Co.*, 204 F. 998 (1913); *Mosher v. City of Phoenix*, 54 F. (2d) 777 (1931); *Stewart v. Hickman*, 36 F. Supp. 861 (1941); *Townsend v. Boston & M. R. R.*, 35 F. Supp. 938 (1940); *Robertson v. Argus Hosiery Mills*, 32 F. Supp. 19 (1940). *Contra: Ex parte Lennon*, 166 U. S. 548, 17 S. Ct. 658, 41 L. Ed. 1110 (1897).

⁸ *Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co.*, 175 U. S. 91, 20 S. Ct. 33, 44 L. Ed. 84 (1899); *Western Union Telegraph Co. v. Ann Arbor R. Co.*, 178 U. S. 239, 20 S. Ct. 867, 44 L. Ed. 1052 (1900); *Sharp v. Barnhart*, 117 F. (2d) 604 (1941); *Postal Telegraph Cable Co. v. Nolan*, 240 F. 754 (1917); *Colonial Drug & Sales Co. v. Western Products Co.*, 54 F. (2d) 216 (1931).

⁹ *Rountree v. Adams Express Co.*, 165 F. 152 (1908); *Postal Telegraph Cable Co. v. Nolan*, 240 F. 754 (1917); *Gable v. Vonnegut Machinery Co.*, 274 F. 66 (1921); *Burke v. Union Pac. R. Co.*, 129 F. (2d) 844 (1942); *Lund v. Woodenware Workers Union*, 19 F. Supp. 607 (1937).

McGoon v. Northern Pacific Railway Company,¹⁰ where the court said: "When the complaint shows a case which arises out of a contract or a common-law right of property, and only indirectly and remotely depends on federal law, such a case not only does not, but cannot properly, turn upon a construction of such law."¹¹ This would seem to cover the situation in the instant case, as the plaintiff's case arose from a common-law right of property, yet it attempted to secure protection for this right from the district court by asserting an indirect influence upon interstate commerce.

The plaintiff also relied upon the provisions of the Railway Labor Act,¹² and upon the provisions of the Interstate Commerce Act.¹³ The cited sections of these acts contain no provision relating to the problem involved herein. The Transportation Act does not touch upon the subject matter of jurisdiction in a dispute of this nature, but deals only with the interstate carrier's problems and responsibilities as such. The same line of reasoning is applicable to the provisions of the Railway Labor Act. This act was intended to benefit the employees in a dispute of this nature. It deals solely with employee's rights and remedies and does not give the employer any grounds for the remedy invoked. In fact the process here employed seems to run counter to the purpose of that statute, for that provides for settlement of disputes without resort to the courts. This the plaintiff has refused to do, at least to the full extent provided by that law. As a consequence, it would seem that the district court should have dissolved the injunction for lack of jurisdiction.

Also involved in the case was the question as to whether or not the provisions of the Norris-LaGuardia Act deprived the district court of jurisdiction.¹⁴ The Circuit Court of Appeals, Seventh Circuit, has held that, where acts of violence have occurred, Section 108 of such statute¹⁵ has no application.¹⁶ While at first blush this may seem a just rule, the restriction placed upon the operation of the act is apparent. One of the principal reasons for the passage of such statute was to restrain the courts from enjoining any conduct when a labor dispute was involved. If the construction placed upon this section by the majority of the court in the instant case is adhered to, the force of the section referred to is greatly reduced. The arguments both for and against such a position are largely social and economic, but, in view of the great disparity that exists between employer and employee,

¹⁰ 204 F. 998 (1913).

¹¹ 204 F. 998 at 1005.

¹² 45 U. S. C. A. §§ 151-60.

¹³ 49 U. S. C. A. §§ 1 et seq.

¹⁴ 29 U. S. C. A. §§ 101-15.

¹⁵ 29 U. S. C. A. § 108 provides in part: "No restraining order or injunctive relief shall be granted to any complainant . . . in the labor dispute . . . who has failed to make every reasonable effort to settle . . . with the aid of any available governmental machinery of mediation or voluntary arbitration."

¹⁶ *Cater Construction Co. v. Nischwitz*, 111 F. (2d) 971 (1940); *Mayo v. Dean*, 82 F. (2d) 554 (1936); *United Electric Coal Companies v. Rice*, 80 F. (2d) 1 (1935).

where means for settlement such as here exist have been established, the better view would be to require full utilization thereof before a resort to the courts should be had. Such means should be pursued to the final, not merely to an intermediary, stage. Compulsory support of such practice would further the policies of the act.

P. M. HICKMAN

MORTGAGES—PAYMENT—WHETHER OR NOT USE OF INSURANCE MONEY TO REBUILD PREMISES AFTER A LOSS, PURSUANT TO AGREEMENT BETWEEN MORTGAGOR AND MORTGAGEE, OPERATES TO REDUCE THE MORTGAGE INDEBTEDNESS—The recent case of *In re McElmurray*¹ disclosed that the mortgagor had given a mortgage containing a covenant to insure against loss or damage by fire, with a further provision to assign such policy to the mortgagee. Pursuant thereto, a policy with the usual mortgage clause was obtained. Upon destruction of the premises, the insurance company adjusted the loss and issued a check payable to both mortgagor and mortgagee. At the time this check was received, it was arranged that the mortgagee should retain the entire fund but would apply one thousand dollars thereof toward the rehabilitation of the premises. Shortly after the repairs had been made and the sum so retained had been expended as agreed, the mortgagor became bankrupt. A general creditor protested the allowance of a preferred claim and lien on behalf of the mortgagee for the unpaid balance of the mortgage on the ground that the entire proceeds of the insurance policy had reduced the debt pro tanto and that any agreement to revive the mortgage to the extent that such proceeds were so used to repair the building was a nullity. It was held, however, that the mortgagee, absent any state law on the subject, was entitled to a preferred claim and lien for the full balance due including the sums expended for repairs.

It is of course fundamental law that a payment on mortgage indebtedness satisfies the lien pro tanto and, once such application is made, the parties thereto may not change the fact so as to interfere with the intervening rights of third persons.² Questions may arise, though, as to whether or not such rule will apply when the source of the fund allegedly constituting the payment arises from the proceeds of insurance covering the mortgaged premises. The answer may depend somewhat on the type of policy secured.

The former practice seems to have been one under which the mortgagor insured his own interest and then assigned his interest in the policy to the mortgagee. It was possible, under that system, for mortgagor and mortgagee to agree to use the insurance money to rebuild.³ In order to avoid having to make claim through the mortgagor, against whom the insurer might have a good defense, the mortgagee would however insure

¹ 47 F. Supp. 15 (1942).

² *Large v. Van Doren*, 14 N. J. Eq. 208 (1862); *Charter Oak Life Ins. Co. v. Smith*, 43 Wis. 329 (1877); *Jacob Tome Institute v. Whitcomb*, 160 F. 835 (1908).

³ *Armstrong v. Price*, 203 N.C. 833, 167 S.E. 77 (1933).

his own interest as mortgagee.⁴ But this practice was dangerous, for if he charged the mortgagor for the amount of the insurance premium, he might be held liable if he failed to properly insure the mortgagor's interest.⁵ If, in the mortgage itself, the mortgagor had covenanted to insure, the mortgagee had then an equitable interest in the proceeds of the mortgagor's fire insurance,⁶ and such equitable interest might be superior even to the interest of the building contractor who repaired the premises.⁷ It would survive a foreclosure sale if there was a deficiency judgment,⁸ and it would even inure to the benefit of a second mortgagee if the latter had also procured a covenant for insurance.⁹

It is now customary for fire insurance policies to contain what is often described as a "union" mortgage clause.¹⁰ Under the "open" mortgage clause the mortgagor is named as the insured but the amount of the loss is payable to the mortgagee, who will therefore take simply as assignee¹¹ and enjoy the ordinary rights of such.¹² The "union" mortgage clause, on the other hand, expressly protects the mortgagee against forfeiture of the policy by the mortgagor's act. Under such form, the mortgagee's interest itself is insured.¹³

On that basis the case of *Friemansdorf v. Watertown Insurance Company*¹⁴ can be distinguished from the instant case because there it was the mortgagor's interest that was insured. It was therefore properly held that the mortgagee had no interest in the proceeds of the insurance after the mortgagor had rebuilt. In contrast, however, the Texas Court of Civil

⁴ *Ponder v. Gibson-Homans Co.*, 166 Ark. 591, 266 S.W. 682 (1924).

⁵ *Barile v. Wright*, 256 N.Y. 1, 175 N.E. 351 (1931).

⁶ *Wheeler v. Factors' and Traders' Ins. Co.*, 101 U.S. 439, 25 L.Ed. 1055 (1880); *Swearingen v. Hartford Ins. Co.*, 52 S.C. 309, 29 S.E. 722 (1898); *Nichols v. Baxter*, 5 R.I. 491 (1858); *Nordyke & Marmon Co. v. Gery*, 112 Ind. 535, 13 N.E. 683 (1887); *Chipman v. Carroll*, 53 Kan. 163, 35 P. 1109 (1894); *Hazard v. Draper*, 89 Mass. 267 (1863); *Butson v. Misz*, 81 Ore. 607, 160 P. 530 (1916); *Montello v. Manhattan Fire & Marine Ins. Co.*, 250 App. Div. 610, 294 N.Y.S. 1015 (1937).

⁷ *Koscher v. Chicago City Bank & Trust Company*, 280 Ill. App. 500 (1935).

⁸ *Priest v. Kaplan*, 290 Ill. App. 92, 7 N.E. (2d) 906 (1937); *Malvaney v. Yager*, 101 Mont. 331, 54 P. (2d) 135 (1936); *Wolf v. Schlichting*, 111 N.J.Eq. 619, 161 A. 840 (1932).

⁹ *Greenberg v. 1625 Putnam Avenue Corp.*, 241 App. Div. 623, 268 N.Y.S. 553 (1934).

¹⁰ For a discussion of the distinction between an "open" mortgage clause and the "union" mortgage clause, see *Malvaney v. Yager*, 101 Mont. 331, 54 P. (2d) 135 (1936), and *Swihart v. Missouri Farmers Mut. Tornado, Cyclone & Windstorm Ins. Co.*, 234 Mo. App. 998, 138 S.W. (2d) 9 (1940).

¹¹ *Carpenter v. The Providence Washington Insurance Company*, 16 Pet. 495, 10 L.Ed. 1044 (1842).

¹² *Tarrant Land Co. v. Palmetto Fire Ins. Co.*, 220 Ala. 428, 125 So. 807 (1930).

¹³ *Swihart v. Missouri Farmers Mut. Tornado, Cyclone & Windstorm Ins. Co.*, 234 Mo. App. 998, 138 S.W. (2d) 9 (1940); *Pink v. Smith*, 281 Mich. 107, 274 N.W. 727 (1937); *Savarese v. Ohio Farmers' Ins. Co. of LeRoy, Ohio*, 260 N.Y. 45, 182 N.E. 665 (1932).

¹⁴ 1 F. 68 (1879). The court indicated that in New York and Wisconsin it was usually the mortgagee's interest which was insured, because of the statutes of those particular states.

Appeals decided that the mortgagee ceased to have any interest in the insurance moneys after the mortgagor's representative had rebuilt, even though the insurance was payable to the trustee under the mortgage.¹⁵ A close scrutiny of later cases, however, furnishes a basis for drawing a distinction. When the debt is not yet due, the mortgagee not only will not be permitted to recover if the mortgagor has restored the premises,¹⁶ but the mortgagor may even be able to recover the insurance moneys from the mortgagee after repairs have been made.¹⁷ The mortgagee, on the other hand, will collect if there is a default of any kind in the mortgage even though the mortgagor may have repaired,¹⁸ but if the debt or any part thereof is due, he must apply such moneys thereto.¹⁹

In Illinois, it has been held that if a trustee has collected insurance moneys, his duties to both parties to the mortgage will require him to keep the moneys as against both parties²⁰ until either the mortgagor repairs before defaulting in the mortgage debt payments, in which case he shall turn the insurance money over to the mortgagor, or until some of the debt becomes due, when he shall pay to the mortgagee out of the insurance moneys whatever is then due, keeping the balance available to pay further installments as they mature.

In the absence of any agreement, it is, of course, presumed that the proceeds of fire insurance will be used, when received by the mortgagee, to reduce the mortgage debt,²¹ but such presumption may be rebutted by an agreement for rebuilding contained in the mortgage itself.²² In the absence thereof, the mortgagee may not be forced to agree to use the insurance moneys to rebuild;²³ nor to apply the proceeds to a junior mortgage;²⁴ nor can the mortgagor be compelled to rebuild.²⁵

15 Huey v. Ewell, 22 Tex. Civ. App. 638, 55 S.W. 606 (1900).

16 Ibid. The distinction was not made in Savarese v. Ohio Farmers' Ins. Co. of LeRoy, Ohio, 260 N.Y. 45, 182 N.E. 665 (1932), where the mortgagee recovered after the mortgagor had repaired, and it did not seem that the debt was due. A conflict of authority was noted, but it was held that in New York the mortgagee may recover.

17 Gordon v. Ware Savings Bank, 115 Mass. 588 (1874); Cottman Co. v. Continental Trust Co., 169 Md. 595, 182 A. 551 (1936).

18 State ex rel. Squire v. Royal Ins. Co., 58 Oh. App. 199, 16 N.E. (2d) 342 (1938).

19 Zeigler v. Federal Land Bank of Houston, (Tex. Civ. App.) 86 S.W. (2d) 864 (1935); Early v. Flannery, 47 Vt. 253 (1875).

20 Fergus v. Wilmarth, 117 Ill. 542, 7 N.E. 508 (1886).

21 Saunders v. Resnick, 142 Pa. Super. 457, 16 A. (2d) 676 (1940).

22 Johnson v. Valido Marble Co., 64 Vt. 337, 25 A. 441 (1892); Seidewitz v. Sun Life Ins. Co. of America, 144 Md. 508, 125 A. 78 (1924).

23 First Nat. Bank of Chicago v. Martin, 289 Ill. App. 624, 7 N.E. (2d) 637 (1937); Larrabee v. Lumbert, 32 Me. 97 (1850); East New York Sav. Bank v. Dickey & Lemberg Co., 258 App. Div. 889, 16 N.Y.S. (2d) 43 (1939); Pink v. Smith, 281 Mich. 107, 274 N.W. 727 (1937).

24 Skinner v. Johnson, (Mo. App.), 74 S.W. (2d) 71 (1934).

25 Gordon v. Ware Savings Bank, 115 Mass. 588 (1874). This may be compared with the rule that a purchaser may not force the seller to apply the insurance moneys to reduce the balance due on the purchase price. The seller may use such moneys to restore the premises: Naquin v. Texas Savings & Real Estate Inv. Ass'n, 95 Tex. 313, 67 S.W. 85 (1902).

Vermont, moreover, allows the parties to make valid agreements as to the disposition of the excess of the insurance proceeds over a portion of the mortgage debt which has become due.²⁶

If the parties should agree to rebuild subsequently to the loss, and there is no part of the debt then due, such agreements are uniformly held valid, as in the instant case, and in case there is a surplus left after repairing it may, but need not, be applied on the mortgage debt.²⁷ The case of *Connecticut Mutual Life Insurance Company v. Scammon*²⁸ seems to contradict this rule but a close examination of the facts therein discloses that there were several mortgagees involved, only one of whom did consent, so that the holding thereof is not in conflict with the general rules here discussed. As the rules herein noted are often taken for granted in practice,²⁹ it is gratifying to see that they appear to be well settled.

G. MASCHINOT

WILLS—RESTRICTIONS ON DEVISES AND BEQUESTS FOR CHARITABLE AND RELIGIOUS PURPOSES—WHETHER COURT OF PLACE OF PROBATE AND ADMINISTRATION SHOULD APPLY FOREIGN STATUTE IN DETERMINING VALIDITY OF BEQUEST OF PERSONAL ESTATE TO LOCAL CHARITY—The testator in *In re Estate of Schultz*,¹ had always made his home in Chicago. He had been divorced for twenty years and was estranged from his two children. In 1937, upon his retirement from business, he made a trip west, having no fixed destination but intending to return. A few weeks later he returned to Chicago and while there made a will describing himself as "William R. Schultz of the City of Chicago, County of Cook and State of Illinois."

²⁶ *Early v. Flannery*, 47 Vt. 253 (1875).

²⁷ *Armstrong v. Price*, 203 N.C. 833, 167 S.E. 77 (1933); *Hall Bldg. Corporation v. Edwards*, 142 Va. 209, 128 S.E. 521 (1925); *Kirkland v. Arnold*, 178 Ala. 227, 59 So. 162 (1912); *Hartford Fire Ins. Co. v. Bleedorn*, 235 Mo. App. 286, 132 S.W. (2d) 1066 (1939); *Johnson v. Valido Marble Co.*, 64 Vt. 337, 25 A. 441 (1892); *Grigg v. Jefferson Standard Life Ins. Co.*, 204 N.C. 799, 169 S.E. 219 (1933); *McFarlane v. Plant*, 185 Miss. 616, 188 So. 530 (1939); *Fergus v. Wilmarth*, 117 Ill. 542, 7 N.E. 508 (1886). In *Howe v. Lewis*, 14 Pick. (31 Mass.) 329 (1833), the agreement upheld concerned money not proceeding from insurance.

²⁸ 117 U. S. 634, 6 S. Ct. 889, 29 L. Ed. 1007 (1886). The fact that the federal court in the instant case enquired into the common law of South Carolina and of the neighbor States may seem to depart from the reasoning in *Friemansdorf v. Watertown Insurance Company*, 1 F. 68 (1879), where the court felt authorized to decide for itself what the federal common law should be, but the change of attitude is certainly due to the views expressed in *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

²⁹ The mortgagee whose debt is not fully discharged by the insurance proceeds would, obviously, be more willing to permit the utilization of a part of the fund to rebuild so as to more adequately secure the balance due, than he would be likely to collect the whole sum of insurance and retain a mortgage for the balance on unusable and unproductive property. Sound business reasons, therefore, underly the policy expressed in such rules.

¹ 316 Ill. App. 540, 45 N.E. (2d) 577 (1942). Hebel, J., dissented. Leave to appeal has been granted: 318 Ill. App. p. i.

The will named the Chicago bank by which he had been employed for nearly twenty years as executor and expressly disinherited his children, leaving the bulk of his estate, subject to an annuity, to be divided between two Illinois charitable corporations organized not for profit. He also opened a safekeeping account with the bank to take care of his investments, but this was a temporary arrangement. Later in 1937 the testator again went west. He spent the next two and one-half years, until his death, in California, residing during the winters in Los Angeles and the summers in Long Beach, but he always registered in hotels as being from Chicago. Some statements in his correspondence indicate that he regarded his residence in California as only a temporary one. Other statements, however, may have been taken to indicate an intention to remain there indefinitely. After testator's death in California his will was probated in Cook County, Illinois, whereupon the two children filed a petition to have the court apply the California law when making distribution of the estate upon the ground that the testator was domiciled there. An order of the Probate Court of Cook County denying such petition was affirmed by the Circuit Court. On appeal by the children, the Appellate Court for the First District applied the rule that the validity of a will of personal property is to be governed by the law of the testator's last domicile to such an extent that the bequests to the charitable corporations had to be reduced to one-third of the estate to the favor of the testator's children whom he had intended to disinherit.

According to the prevailing view, the validity of a will of personalty is to be determined by the law of the decedent's last domicile,² but deciding just where the decedent was domiciled at the time of his death has occasioned considerable difficulty. This difficulty is due in part to the transition from a society in which a person had but one home to a society in which persons frequently maintain several "homes." Domicil, however, is the place to which a person is attached for certain legal consequences.³

Two widely different points of view concerning domicil have found recent expression. The Restatement of Conflict of Laws has adopted the view that a person can have but one domicil at a time for all purposes.⁴ According to this point of view, domicil must be the same whether determined in a case involving jurisdiction to grant a divorce, to tax, to control the intestate distribution of personal property, to determine the validity of a will of personalty, or for the purpose of determining the validity of constructive service of process. But this view has been the subject of much adverse criticism, and has been actively objected to by Professor Walter Wheeler Cook,⁵ who has maintained the position that "the meaning given to the symbol 'domicil' has varied with the nature of

² Beale, *A Treatise on the Conflict of Laws*, II, § 306.1, p. 1034.

³ Restatement, *Conflict of Laws*, § 9.

⁴ *Ibid.*, § 11.

⁵ Cook, *The Logical and Legal Bases of the Conflict of Laws* (Harvard University Press, 1942), Ch. VII.

the problem presented. . . . "According to him, the problem in any case should be: "Do the facts of this case show a connection of this person with the state in question of such a character as to make it reasonable to do the particular thing asked?"⁶

An examination of the opinion in the instant case indicates that the court adopted the first of these views and acted upon the assumption that the domicile remains the same for all purposes. Such action is indicated by the fact that the court relied upon cases involving domicile as determinative of the right to vote⁷ and as fixing liability to pay income tax,⁸ among others, in deciding that the testator was domiciled in California. Under the view proposed by Professor Cook, it would seem clear that the testator should have been held to have retained his Illinois domicile. Indeed, had the court chosen to be guided by prior Illinois decisions in cases where domicile was determined for the purpose of intestate distribution of personalty,⁹ it is probable that the court would not have found a California domicile to have been established. There seems to have been no evidence of any connection of the testator with California other than the fact of his physical presence there for an extended period. The evidence as to his intention in remaining there did not clearly and convincingly indicate that he regarded California as his home. The result reached by the court, therefore, seems exactly opposite to the testator's expressed intention. As a consequence, the disposition of substantially all of his estate to the local charitable institutions was held to be partially invalid under the California statute¹⁰ and these bequests had to be reduced to one-third of the estate. The remainder, subject to the annuity, by the force thereof had to be distributed to children from whom the testator was estranged and whom he had expressly disinherited.

The court might have avoided this result in yet another way, as by finding that the California statute, when applied to the facts of the case, was contrary to the public policy in Illinois. The court could have found that since distribution was to be made in Illinois, the policy that the intention of the testator should be carried out wherever possible¹¹ should prevail over the usual conflict of laws rule.¹² Such a result might be justified since the disposition made by the testator was for charitable purposes¹³ and Illinois does not restrict the amount of testamentary gifts to charity. Since the California statute has been decided to be a limitation

⁶ Cook, *op. cit.*, 196.

⁷ *Kreitz v. Behrensmeyer*, 125 Ill. 141, 17 N.E. 232 (1888).

⁸ *District of Columbia v. Murphy*, 314 U. S. 441, 62 S. Ct. 303, 86 L. Ed. 329 (1941).

⁹ *Miller v. Brinton*, 294 Ill. 177, 128 N.E. 370 (1920); *Cooper v. Beers*, 143 Ill. 25, 33 N.E. 61 (1892); *Hayes v. Hayes*, 74 Ill. 312 (1874); *Channel v. Capen*, 46 Ill. App. 234 (1892).

¹⁰ *Deering's Probate Code Cal.* 1941, Art. II, §§ 41 to 43.

¹¹ *Donan v. Donan*, 236 Ill. 341, 86 N.E. 279 (1908); *Brill v. Green*, 316 Ill. 583, 147 N.E. 446 (1925); *Applehans v. Jurgenson*, 336 Ill. 427, 168 N.E. 327 (1929).

¹² See, for example, *Johns Hopkins University v. Uhrig*, 145 Md. 114, 125 A. 606 (1924).

¹³ *Farmers' & Mechanics' Bank v. Griffith*, 352 Ill. 323, 185 N.E. 854 (1933);

upon a testator's power of disposal,¹⁴ the court could not construe the statute as being inapplicable to gifts to charitable institutions outside of California, but it might have refused enforcement thereof as opposed to local public policy.

An additional problem was involved, but was not discussed in the opinion in the instant case. No original administration proceedings had been instituted in California, nor had the will been probated there. In view of this fact, a question might have been raised as to whether original probate was proper in Illinois by reason of the holding as to domicile.¹⁵ The question would, however, seem to have been settled in favor of allowing such proceedings by reason of the provisions of the recently revised Probate Act.¹⁶

J. J. BUECHEL

WORKMEN'S COMPENSATION—EFFECT OF ACT ON OTHER STATUTORY OR COMMON LAW RIGHTS OF ACTION—MEANING OF "BOUND BY THE ACT" AS APPLIED TO RIGHT OF LEGAL REPRESENTATIVE OF DECEASED EMPLOYEE TO MAINTAIN ACTION FOR WRONGFUL DEATH AGAINST THE EMPLOYEE OF ANOTHER—By the decision of the Illinois Supreme Court in *Thornton v. Herman*,¹ it has been definitely settled that neither an employee nor a deceased employee's legal representative may bring suit under the Injuries Act² against a fellow or other employee for negligence, where both employees and their employer or employers are under the provisions of the Workmen's Compensation Act.³ All parties mentioned are "bound by the act" and their rights and liabilities are to be determined solely by the applicable section thereof. In that case, the deceased was an employee of Cassity-Richards, Inc., and while so employed received injuries causing his death as a result of the negligence on the part of the defendant while the latter was engaged in the line of his duty as an employee of R. R. Donnelley & Sons Company. All parties were operating under the workmen's compensation statute. The widow, after she had already received an award from the Industrial Commission and had been paid the amount thereof by her husband's employer, brought the present action, as administratrix, against the wrong-doing employee to recover damages for wrongful death.

Judgment for the plaintiff in the trial court was affirmed in the appellate court⁴ on the theory that the pertinent phrase "bound by the act" meant being subject to the terms of the act in the sense of being liable to pay compensation. The Supreme Court reversed, holding that,

Grear v. Sifford, 289 Ill. App. 450, 7 N.E. (2d) 371 (1937); *Carlstrom v. Frackelton*, 263 Ill. App. 250 (1931).

¹⁴ *In re Layton's Estate*, 217 Cal. 451, 19 P. (2d) 793 (1933); *Halm v. Halm*, 196 Cal. 778, 239 P. 307 (1925); *Estate of Lathrop*, 165 Cal. 243, 131 P. 752 (1913).

¹⁵ *Davis v. Upson*, 230 Ill. 327, 82 N.E. 824 (1907).

¹⁶ Ill. Rev. Stat. 1941, Ch. 3, § 240.

¹ 380 Ill. 341, 43 N.E. (2d) 934 (1942).

² Ill. Rev. Stat. 1941, Ch. 70, § 1.

³ Ill. Rev. Stat. 1941, Ch. 48, § 166.

⁴ *Thornton v. Herman*, 311 Ill. App. 513, 36 N.E. (2d) 840 (1941), noted in 30 Ill. B. J. 383, 9 U. of Chi. L. Rev. 362.

as applied to employees, actions to recover damages for accidental injuries or for death were controlled by the provisions of the compensation act and that Section 29 thereof could not be construed as distinguishing between "being bound by the act" to pay compensation and "being bound by the act" in reference to a right of recovery for injuries caused by negligence.

Inasmuch as, prior to the instant case, the Supreme Court of Illinois had never directly passed upon the meaning of the expression "bound by this act" as applied to the factual situation found in the instant case, and inasmuch as many common law actions had been brought, based upon interpretations thereof in the various appellate courts of the state, as reflected in *Botthof v. Fenske*,⁵ it was of considerable importance to have this question decided clearly by the court of last resort. In that case, an employee, while in the line of his duty, was injured through the negligence of a fellow-employee. A common law action in negligence, based on the injury sustained, was filed, to which the defendant filed three pleas. One plea was that plaintiff's sole remedy was under the Illinois Workmen's Compensation Act. To this plea, plaintiff filed a general and special demurrer which the trial court overruled and judgment thereupon went against the plaintiff. On appeal, after a long and carefully considered review of the facts, the statute, and prior decisions of the Supreme Court, the appellate court held that there was to be observed in the statute no legislative intent to absolve any one but the employer from liability in a civil action for damages. As a consequence, it held that the wrong-doing employee had no statutory protection against the results of his own wrongful acts. The case was, therefore, returned to the trial court with directions to sustain plaintiff's demurrer to the plea and to proceed on the theory of a case for negligence.

In arriving at its decision therein, the appellate court held further, in interpretation, that the phrases "bound by the act" or "subject to its terms" applied to the employer and could not include the wrong-doing employee as he clearly never could be compelled to pay "compensation" to anyone. *O'Brien v. Chicago City Railway Company*⁶ was examined by the court, but the guiding facts therein were not considered to be applicable.

The decision in the Botthof case was followed by *Hoff v. Lindstrom*,⁷ which reached the same result, although a contrary decision had been rendered in another appellate district in the case of *Huntoon v. Pritchard*.⁸ Uniformity in interpretation was recognized as necessary by practitioners in the field,⁹ for the O'Brien case was not considered sufficiently comprehensive.

⁵ 280 Ill. App. 362 (1935).

⁶ 305 Ill. 244, 137 N.E. 214 (1922).

⁷ 284 Ill. App. 651, 3 N.E. (2d) 149 (1936).

⁸ 280 Ill. App. 440 (1935).

⁹ See George W. Angerstein, "Section 29 of the Workmen's Compensation Act of Illinois," 19 CHICAGO-KENT LAW REVIEW 231 (1941).

As in the Botthof case, so too in the instant case, the defense to the action by the administratrix was in substance the inability of the plaintiff to maintain the action. The defendant contended that, by the provisions of Section 29 of the Act,¹⁰ the plaintiff's right of action had been transferred to the employer of the deceased employee. This the plaintiff conceded if the defendant was an employee and a person "bound by the act" within the meaning thereof. But, the plaintiff argued, the negligent third person was not bound thereby and was, therefore, subject to suit. The Supreme Court, however, held that the construction given by the appellate court would limit the application of Section 29 to such persons only as were required to pay compensation. Such construction would, of course, not include employees, but it felt no such distinction was warranted. Decisions in other states in matters such as these are never very helpful in view of the fact that the wording of the several statutes is not uniform.¹¹

By so deciding, the Supreme Court has finally clarified and settled a provision which created much litigation. It must now be understood that, hereafter, the right of action of an injured employee is transferred to his employer, and the amount of damages in any action over is limited to the amount of the compensation to be ascertained under the act. "Bound by the act" now becomes an all-inclusive term.

J. F. MIRABELLA

¹⁰ Ill. Rev. Stat. 1941, Ch. 48, § 166.

¹¹ For a contrary holding, see *Holland v. Morley Button Co.*, 83 N.H. 482, 145 A. 142 (1929).